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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 526

BLANCO OIL CO. and KILLAM & HURD, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Blanco Oil Co., a corporation, and Killam & Hurd, a partnership, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, entered on May 24, 1967.

OPINIONS BELOW

The opinion and judgment of the Fifth Circuit Court of Appeals is not yet reported but is printed as Appendix "A" of the petition for certiorari in this same case filed by Austral Oil Company Incorporated, No.

504, October Term 1967. Opinion No. 478 of the Federal Power Commission, issued September 30, 1965, is printed in Volume I of the Joint Appendix ("J.A."), nine copies of which are filed with the Austral petition, at pages 436-463. The Presiding Examiner's Initial Decision, issued June 22, 1965, is printed at J.A. 349-432.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows:

Section 7(c), 15 U.S.C. 717f(c)

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary cer-

tificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *.

Section 7(e), 15 U.S.C. 717f(e)

* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale, * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

QUESTION PRESENTED

The Natural Gas Act gives the Federal Power Commission the authority to issue temporary certificates of public convenience and necessity to producers of natural gas pending disposition of their applications for permanent certification. Although these temporary certifications are issued on an *ex parte* basis, affected persons have a right to seek review. Further, under the Natural Gas Act the Commission has the authority to subject the issuance of temporary certificates to "such reasonable terms and conditions as the public convenience and necessity may require." It is clearly

established that in the exercise of this conditioning power, the Commission can (1) require a producer to reduce its negotiated contract price to a level deemed by the Commission low enough to hold the price line, (2) require an agreement not to seek any rate increase while the temporary certificate is in force, and (3) require an agreement to refund amounts collected in excess of a specific price if the price permanently certified is lower than the price authorized by the temporary certificate. Invariably, whenever it employs its conditioning power in any of the foregoing respects, the Commission requires the producer to accept the conditioned temporary in writing before commencing service, thus creating in effect a contractual relationship between the producer and the Commission.

In this case the Commission issued a temporary certificate to the Petitioners conditioned upon a reduction of their contract price to a lower price, thus holding the price in line with other certificated prices at the time, and stipulated that no higher price could be charged during the period of temporary service. It also required acceptance of the certificate in writing. No condition was imposed requiring refunds if the permanent certificate was issued at a price lower than that contained in the temporary certificate and there was no notice of any kind that refunds might be required. Petitioners' acceptance of the temporary certificate was in accordance with the general understanding at the time, *viz.* that they were "without any obligation to refund"; and their acceptance was approved and filed as part of their rate schedules.

Considering the existence of the foregoing powers and the Commission's actions, the question is whether

the Commission has the authority to order refunds of amounts collected in excess of the permanently certificated price.[1]

STATEMENT

Petitioners, Blanco Oil Co. and Killam & Hurd, are independent producers of natural gas. On October 20, 1960, they applied to the Federal Power Commission for authorization under Section 7 of the Natural Gas Act to sell natural gas in the interstate market from their wells in the Northeast Thompsonville Field in Texas Railroad District No. 4. These sales were pursuant to contracts which provided for an initial price of 20.045 cents per Mcf to be paid by the pipe line company.

Petitioners also requested temporary authority to commence sales at the contract price. This was less than one month after the Commission had issued Statement of General Policy No. 61-1[2] which established 18 cents per Mcf as the guideline price for Texas Railroad District No. 4. This Statement, *inter alia,* was

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[1] While the court of appeals ruled on the power of the Commission to order refunds in appropriate cases, it did not decide whether it would be proper for the Commission actually to order refunds on the facts and circumstances presented by petitioners' case. In light of the fact that the Commission has attempted to raise the question of propriety in its petition for certiorari in No. 80, October Term 1967, petitioners reserve the right also to argue this question if certiorari is granted. Petitioners contend that a refund order would be a denial of their rights under the Fifth Amendment to the Constitution of the United States under all the facts. In the event any aspect of the in-line price determination made by the Commission is presented to the Court by any party, petitioners also reserve the right to contest the validity of such determination as to them.

[2] Statement of General Policy No. 61-1, issued September 28, 1960; 24 F.P.C. 818.

intended to implement this Court's mandate in *CATCO*[3] "to hold the line" on natural gas prices.

Consequently, the Commission rejected Petitioners' efforts[4] to collect the contract price during the period of temporary service. It conditioned the temporary certificate by reducing the contract price to the guideline 18-cent price, requiring that no higher price be collected during the period of temporary service and requiring the written acceptance of the temporary certificate by the Petitioners (J.A. 216-220). Although conditions requiring an agreement to refund were utilized by the Commission at the time, no such condition was included in the temporary certificate offered to the Petitioners. Reflecting their understanding of the Commission's intentions and of law (*Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404 (10th Cir. 1959)), Petitioners' acceptances of the temporary certificates offered by the Commission by letters of January 16, 1961, specifically state that they were "without any obligation to refund" (J.A. 232-237). These letters were approved by the Commission on January 18, 1961, and designated as supplements to Petitioners' rate schedules.

On September 30, 1965, after extensive proceedings and after a delay of almost five years, the Commission issued its final decision on the applications for per-

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[3] *Atlantic Refining Co.* v. *Public Serv. Comm'n* (*CATCO*), 360 U.S. 378 (1959).

[4] Prior to accepting the temporary certificate, as offered by the Commission, the Petitioners twice sought to collect the contract price subject to refund down to the 18 cent guideline price. Subsequently, Petitioners twice filed rate increases up to the initial contract price which were rejected by the Commission because, it said, the temporary certificate required that no higher price than 18 cents could be collected during the period of temporary service.

manent certificates, granting them on the condition that Petitioners charge no more than 15 cents per Mcf (Opinion No. 478, J.A. 436-463). It was at this time that the Commission in this proceeding first raised the question of whether refunds should be ordered as a condition to the issuance of permanent certificates; however, this question was deferred for subsequent consideration. Paragraph (K) of the Commission's Opinion requested the parties to file briefs on the refund question and to outline the type of evidence which they would wish to place in the record bearing on the refund issue (J.A. 458-59).

Petitioners filed a brief in compliance with this request urging that the Commission lacked the power to order refunds and that for several reasons refunds would be inequitable as to them. For example, Petitioners pointed out that Atlantic Refining Company, which is the largest producer in the same field, and which had sold gas under an identical temporary certificate issued at the same time, had received permanent certification for sale under a contract identical with Petitioners, and, in one instance, from a well jointly owned by Petitioners and Atlantic. However, Atlantic, which had also collected rates in excess of 15 cents, was not required to make any refunds whatsoever.

On July 25, 1966, the Commission issued Opinion No. 499, stating that,

> "The Commission has both the power and the duty to order refunds where amounts in excess of the in-line price have been collected by a producer operating under a temporary certificate without specific refund conditions * * *"

The Commission also ruled that nothing set forth in the briefs of the parties required a hearing on the refund issue. It stated that Atlantic was spared a refund

obligation as a *quid pro quo* for the settlement of an investigation proceeding involving all of its jurisdictional sales that was then pending before the Commission. (No such investigation was pending as to Petitioners' sales.) On September 2, 1966, the Commission granted applications for rehearing of Opinion No. 499 and has taken no further action.

On May 24, 1967, the Fifth Circuit Court of Appeals upheld the Commission's Opinion No. 478 which set the in-line price of 15 cents per Mcf. for Petitioners. While the Commission's opinion No. 499 was not before it, the court of appeals also held that the Commission has the power to order refunds of amounts collected under unconditioned temporary certificates but that it must first explore and give due weight to "all equitable considerations involved." Regarding the power to order refunds, the court stated:

> "With deference to the Tenth Circuit, we disagree with the reasoning in *Sunray Mid-Continent* and the decisions following it insofar as those decisions reject the power of the FPC to order refunds, if it is made to appear that it is appropriate to do so, in whole or in part, after weighing all equitable considerations."

REASONS FOR GRANTING THE WRIT

Whether the Federal Power Commission has the authority to order refunds of amounts collected under a temporary certificate when the Commission issued the temporary certificate without imposing any conditions requiring refunds and without giving notice that refunds might be required is a question of substantial importance upon which the circuits are divided. Further, the holding of the court of appeals below does not conform with decisions of this Court and is predicated

upon an incorrect interpretation of the Natural Gas Act. Finally, the refund of amounts collected under unconditioned temporary certificates is not required in order adequately to protect consumers since any resulting reduction in the individual consumer's price would be minimal and there is no assurance that the full amount of any refund will actually reach the consumer.

1. The result reached by the court of appeals in this case is in acknowledged conflict with the holding of the Court of Appeals for the Tenth Circuit in *Sunray DX Oil Co.* v. *FPC*, 370 F. 2d 181 (10th Cir. 1966), and several related cases.[5] The Tenth Circuit has taken the position that the Commission can order refunds only when a producer contractually undertakes to make them by accepting a temporary certificate containing an express refund condition. Several petitions for certiorari seeking review of the Tenth Circuit decisions are already pending before this Court, including one by the Solicitor General on behalf of the Federal Power Commission (Nnmbers 60, 61, 62, 80, 227 and 415, October Term, 1967).[6]

Petitioners respectfully urge this Court to consider this case along with the petitions requesting review of the Tenth Circuit decisions and to resolve this conflict

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[5] *Pan American Petroleum Corp.* v. *FPC*, 376 F. 2d 161 (10th Cir. 1967); *Standard Oil Co. of Texas* v. *FPC*, 376 F. 2d 578 (10th Cir. 1967); *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404 (10th Cir. 1959).

[6] The Federal Power Commission and others seeking review of the Tenth Circuit decisions state that they conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Public Serv. Comm'n* v. *FPC*, 329 F. 2d 242 (D.C. Cir. 1964), certiorari denied *sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963 (1964). Petitioners herein do not dispute this contention.

so that this proceeding, which is now almost seven years in duration, can resume toward an orderly solution.

2. The decision of the court of appeals in this case does not conform with several decisions of this Court. This Court has repeatedly stated that the Commission has no power to make reparation orders and that its power to fix rates is prospective only. *United Gas Improvement Co.* v. *Callery Properties, Inc.* (*Callery*) 382 U.S. 223, 229 (1965); *Atlantic Refining Co.* v. *Public Serv. Comm'n,* 360 U.S. 378, 389 (1959); *FPC* v. *Hope Natural Gas Co.* 320 U.S. 591, 618 (1944). These holdings are consistent with holdings of the Court in respect to other statutes similar to the Natural Gas Act. Thus, in *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, 469-470 (1959), this Court held that in the absence of a grant of a reparations power in the governing statute neither a court nor a regulatory authority has power to order refunds of excessive rates collected under the filed tariffs. See also, *Montana-Dakota Utilities Co.* v. *Northwestern Public Serv. Comm'n,* 341 U.S. 246 (1951).

3. The Commission, in its petition for certiorari to the Tenth Circuit in No. 60, October Term 1967, urges that the power to impose a refund condition is not sufficient protection for the consumer regarding gas sales that have already occurred or will occur under temporary certificates already issued. It points to the existence of 579 outstanding contracts in which this identical refund issue could arise. Petitioners respectfully refer to page 12 of the brief in opposition for Respondent, Lamar Hunt, in No. 60, which strongly indicates that there are potentially far fewer refunds than the government suggests. Moreover, the power to order refunds of amounts collected under un-

conditioned temporary certificates will not measurably enlarge the protection afforded the consumer by clearly established powers of the Commission.

The Commission lacks direct jurisdiction over the distributors through whom refunds to consumers must be funneled. There is no assurance that the individual consumers affected by the payment of the 18-cent price herein would receive all of any refunds required to be paid by Petitioners. Actually, in the past a substantial portion of refunds paid by pipe lines to distributors have been retained by the distributors to compensate for claimed increased costs. Indeed, the Commission has acknowledged that it has no direct authority to insure that the consumers receive the benefit of refunds, since ultimately this is within the jurisdiction of the various state commissions. *Skelly Oil Co.*, 35 F.P.C. 849, 854-55 (1966); *Humble Oil & Refining Co.*, 32 F.P.C. 49, 52-53 (1964).

Even more important than the question of whether the consumer ever receives refunds is the fact that the amount received by the producer for the sale of natural gas is but a small percentage of the cost to the consumer. Recent United States Government statistics show that only 14.9 per cent of the amount the average residential consumer pays for gas goes to the producer.[7] The amount of money involved in the

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[7] The United States Bureau of Mines reports that in 1965 the average wellhead price for natural gas in the United States was 15.6 cents per thousand cubic feet and that the average price for residential use was 104.8 cents per thousand cubic feet. Thus, the wellhead price in 1965 was 14.9 per cent of the amount paid by the average residential consumer. It is possible, of course, that 1966 and 1967 prices would alter this average slightly, but the average has remained fairly constant since 1962. United States Bureau of Mines, *1965 Minerals Yearbook*, Natural Gas Chapter, Table 1, page 2 and Table 10, page 19.

potential refunds is obviously but a fraction of the total amount received by individual producers for their gas. Thus, the potential refund benefit for the average consumer is actually quite small.

Manifestly, the power to order refunds of amounts collected under unconditioned temporary certificates, where none is contained in the statute, is not required for the protection of consumers.

CONCLUSION

The petition for a writ of certiorari should be granted and the case consolidated for briefing and oral argument with Nos. 60, 61, 62, 80, 227 and 415, October Term 1967.

Respectfully submitted,

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